IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.9.2006

CORAM:

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

CRIMINAL APPEAL No.325 OF 2004

1.Murugan
2.Saravanan
3.Sakthivel
4.Ramesh
5.Velu
6.Suresh Kumar
7.Thiruvengadam
8.Devaraj ... Appellants/Accused

Vs.

State, by
The Inspector of Police,
R-5, Choolaimedu Police Station,
Choolaimedu, Chennai.
(Cr.No.748/2001) ... Respondent/Complainant

* * *

Criminal Appeal preferred under Section 374 of the Code of Criminal Procedure as against the judgment of conviction dated 6.1.2004 rendered in Sessions Case No.115 of 2003 by the learned Additional Sessions Judge (Fast Track Court No.V), Chennai.

* * *

For Appellants 1 to 3 : Mr.S.Ananthanarayanan
For Appellants 4 & 5 : Mr.B.Karunakaran
For Appellant No.6 : Mr.N.Chandrasekaran
For Appellant No.7 : Mr.V.Parthiban
For Appellant No.8 : Mr.C.M.Gunasekaran
For respondent : Mr.C.T.Selvam, A.P.P.

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JUDGMENT

(Judgment of the Court was delivered by M.THANIKACHALAM,J.)

A.1 to A.8, who stand convicted for the offences under Sections 148, 302 r/w.149 and 307 r/w.149 IPC and sentenced to undergo two years Rigorous imprisonment for the offence under Section 148 IPC; life imprisonment and to pay a fine of Rs.5,000/= each in default to undergo RI for six months for the offence under Section 302 r/w.149 IPC and further to undergo RI for seven years and to pay a fine of Rs.3,000/= each in default to undergo RI for six months for the offence under Section 307 r/w.149 IPC, in Sessions Case No.115 of 2003, on the file of the learned Additional Sessions Judge (Fast Track Court No.V), Chennai, are the appellants.

2. The respondent/police filed a final report before the Court concerned, seeking punishment for the accused, as if they have formed themselves into an unlawful assembly, armed with deadly weapons with the common object of committing the rioting or unlawful activities and pursuant to the same, they have attacked one Sundar (since deceased), using deadly weapons, like knives and iron rods and that in the same transaction, all of them have also aimed the life of one Velappan (P.W.5), who had witnessed the above said incident, that too, when he attempted to prevent the same and therefore, all of them should be dealt with under Sections 148, 302 r/w.149 and 307 r/w.149 IPC.

3. The learned Sessions Judge, satisfying herself, perusing the records, framed charges under Sections 148, 302 r/w.149 and 307 r/w.149 IPC, thereby directing the prosecution to prove the offences, alleged against the accused, beyond all reasonable doubts, as mandated by the criminal jurisprudence.

4. Responding to the above command, on behalf of the prosecution, 16 witnesses have been examined, seeking buttress from Exs.P.1 to P.29, as well as strength from M.Os.1 to 6. On behalf of the accused, though it is not mandatory, no oral or documentary evidence has been adduced.

5. The learned Sessions Judge, while evaluating the above materials, satisfied herself, that the prosecution discharged its onerous duty of proving the guilt of the accused beyond all reasonable doubts. In this view, the trial Court slapped conviction on all the accused under Sections 148, 302 r/w.149 and 307 r/w.149 IPC and sentenced them to undergo imprisonment, besides directing them to pay fine, as stated supra, which is under challenge in this appeal.

6. The brief facts, as culled out from the prosecution witnesses, leading to this criminal appeal, are as follows:

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a) A.1, by name Murugan, an electrician, was working in a concern called "Basha Associaties", under which the deceased Sundar was the sub-contractor. Ramakrishnan (P.W.2) is known to the deceased Sundar, since he was also working along with P.W.5 Velappan. Between A.1 and Sundar-the husband of P.W.8, there was some dispute regarding sharing of stolen property or in connection with the other day-to-day activities, thereby A.1 had grievance against the deceased Sundar.

b) On 24.3.2001, at about 11.15 p.m. (night), P.W.5-Velappan, Sundar (deceased), Swaminathan and one Mohan were standing at Nungambakkam Railway Station in order to board the train. At that time, under the leadership of A.1, other accused came there, forming themselves into an unlawful assembly, armed with deadly weapons-M.Os.1 to 4 and on seeing Sundar, in the presence of P.W.5, all the accused indiscriminately attacked Sundar, causing multiple injuries all over his body, despite the attempts made by P.W.5 to prevent the incident, in which he had also sustained a cut injury at the hands of A.6 with M.O.1. After the incident, all the accused ran away from the scene of crime, which was later informed to P.Ws.1 to 3 and 6.

c) Thiru Velappan (P.W.5), immediately, by boarding a train, went to Egmore Railway Police Station and informed the Egmore Railway Police about the incident, which had taken place. Since a cognizable offence was reported, the Police in the Egmore Railway Police Station, admitted P.W.5 in Kilpauk Medical College Hospital.

d) P.W.7-Syed, coming to know about the fact that Sundar, a Labour Contractor working under him, was assaulted, rushed to the scene of crime and with the help of P.W.4-auto driver, took injured in the auto, admitted him at the first instance in a private hospital and thereafter, admitted him in the Kilpauk Medical College Hospital.

e) Thiru Rajasekaran-P.W.15, the then Inspector of Police, Law and Order, Railway Police, Egmore Railway Police Station, on information about the admission of P.W.5 and Sundar in the Hospital, went to the hospital, examined P.W.5 and recorded a statement-Ex.P.7. On the basis of Ex.P.7, P.W.15 registered a case in Cr.No.242/2001 under Sections 147, 148, 341, 324 IPC r/w.147 of the Indian Railways Act, for which he prepared the printed FIR-Ex.P.19 and sent the same to the Court.

f) Thiru Dr.Manivel (P.W.11), coming to know, on 25.3.2001 at about 00.15 hours, P.W.5 and Sundar are admitted in the hospital as inpatients, enquired P.W.5 and treated him for which he issued Ex.P.9-Accident Register. Examining Sundar, who was brought to the hospital, by his friend Swaminathan, he noticed a stab injury on the right flank, through which intestine was also protruding. Recording the same, P.W.11 issued Ex.P.10. The Doctor, who examined P.W.5 thereafter certified that the injury sustained by P.W.5 is simple in nature, under Ex.P.11.

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g) P.W.15-the Inspector of Police, taking the case for investigation, went to the scene of crime, prepared sketch-Ex.P.20 and examined the witnesses also. Upon information, on 27.3.2001, he arrested A.1 at about 16.15 hours and thereafter, arrested A.2 and A.3. On 29.3.2001, Sundar, who was admitted in the hospital for treatment, succumbed to the injuries and therefore, the case originally registered was altered to one under Section 302 IPC, as per Ex.P.24.

h) In continuation of the investigation, P.W.15 went to the hospital, conducted inquest, prepared inquest report-Ex.P.21 in the presence of panchayatdars and recovered M.Os.5 and 6 under Ex.P.22. Thereafter, giving requisition-Ex.P.23, P.W.15 requested the XIV Metropolitan Magistrate, Chennai to send M.O.5 for chemical examination. Further, in order to ascertain the actual cause of death of Sundar, his body was sent for Post Mortem examination through P.W.10, giving requisition under Ex.P.12.

j) On receipt of Ex.P.12 requisition, P.W.12 Doctor conducted autopsy over the dead body of Sundar and found the following injuries, which are recorded in Ex.P.13 Post Mortem Report:

1. Oblique sutured would 6 cm. long over outer aspect of right elbow. On removal of sutures: the margins are clean cut and muscle deep.
2. Oblique sutured wound 4.5 cm. long on front of upper one-third of right upper arm. On removal of sutures: the margins are clean cut and muscle deep.
3. Horizontal sutured wound 3.5 cm. long over the sacral region. On removal of sutures: the margins are clean cut and bone deep.
4. Oblique sutured wound 4 cm. long over left side of back of chest 4 cm away from mid-line. On removal of sutures: the margins are clean cut and muscle deep and the wound is not communicating with the thoracic cavity.
5. Horizontal sutured wound 4 cm. long on front of right side of abdomen. The outer end is 20 cm. below the right nipple and the inner end is 11 cm. from the mid-line. On removal of sutures, the margins are clean cut and the underlying peritoneum found sutured with silk.
6. Oblique sutured wound 1.5 cm. long over right loin. On removal of sutures margins are clean cut (surgical drainage).
7. Vertical sutured wound seen on front of middle of abdomen 25 cm. long extending from 3 cm. below the xiphoid process to 4 cm. below the umbilicus. On removal of sutures, the margins are clean cut (surgical incision)."

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The Doctor is of the opinion, the deceased did of complication of stab injury to the mesentery.

(k) The investigation, so completed by P.W.15, revealed that the incident had taken place within the jurisdiction of Choolaimedu Police Station and therefore, obtaining necessary orders from the superiors, he transferred the case to Choolaimedu Police Station where, P.W.16 was working as Inspector of Police (Law and Order).

(l) On receipt of the file from P.W.15, P.W.16 registered a case on the file of Choolaimedu Police Station, in Cr.No.748/2001, for which he prepared Ex.P.25 FIR, which was sent to the Court through P.W.14. Thereafter, once again P.W.16 re-examined the witnesses, in addition to recording their statements.

(m) Meanwhile, A.4 to A.8 surrendered before the Court, which came to the knowledge of P.W.16. On application, under Ex.P.26, obtaining the order, taking custody of the above said accused, when P.W.16 examined A.4, he confessed, in the presence of P.W.4 and another, that he will take out the weapons used by them to assault Sundar, which was recorded as Ex.P.27-admissible portion. Pursuant to the same, M.Os.3 to 5 were recovered in the presence of mahazar witnesses, under Exs.P.28 and P.29.

(n) At the request of P.W.16, as directed by the Chief Metropolitan Magistrate, under Ex.P.16, the then XIII Metropolitan Magistrate, Chennai-P.W.13 conducted the Test Identification Parade, sending Ex.P.17 to the Superintendent of Central Prison on 30.4.2001, wherein P.W.5 had identified all the accused more than once, despite the fact the accused were directed to change their places in the row, according to their wishes, for which P.W.13 prepared Ex.P.18 report. Exs.P.14 and P.15 are the Toxicology Report and Serology Report respectively, received from the Forensic Department.

(o) Thus, the materials collected by P.Ws.15 and 16, including the statements recorded by them then and there, revealed the fact that the accused have committed the murder of Sundar, due to previous enmity, that too, at the instance of A.1. In this way, a final report came to be filed, leading to trial, ending in conviction, which is assailed in this appeal.

7. Heard Mr.S.Ananthanarayanan, learned counsel for appellants 1 to 3; Mr.B.Karunakaran, learned counsel for appellants 4 and 5; Mr.N.Chandrasekaran, learned counsel for appellant No.6; Mr.V.Parthiban, learned counsel for appellant No.7; Mr.C.M.Gunasekaran, learned counsel for for appellant No.8 and Mr.C.T.Selvam, learned Additional Public Prosecutor.

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8. The learned counsel appearing for the appellants/accused submitted that:-

i) the original FIR, which ought to have set the law in motion, has been suppressed, giving a reasonable doubt about the genesis of the case, resulting its benefit to the accused;

ii) the only oral evidence of P.W.5 is not only mutually contradictory but also totally unbelievable, being unnatural and artificial and this being the position, the trial Court has committed an error in passing the judgment of conviction based upon the uncorroborated, unconvincing sole testimony of P.W.5, which requires to be set aside;

iii) when there was an opportunity for the prosecution to record the statement of the deceased, which would have thrown much light upon the matter in issue, admittedly, the prosecution failed, which should lead to the conclusion, suppressing the real fact, obtaining false statement from P.W.5 that too after deliberations with the deceased and therefore, conviction based upon Ex.P.7 is not at all legally sound in the eye of law;

iv) the trial court has not even properly framed charges against the accused and as such, framing charges against all the accused under Section 302 r/w.149 IPC is erroneous, which cannot even be cured by Section 464 Cr.P.C;

v) when the Doctor's evidence is silent, which injury was fatal, terminating the life of the deceased Sundar and when there is nil evidence which accused had caused which injury to the deceased, convicting all the accused under Section 302 r/w.149 IPC, as if mere presence, being the members of the unlawful assembly is sufficient, to convict the accused, is not based upon any legal principle, which requires setting aside;

vi) from the materials available, it is seen, even the prosecution is not certain and definite about the scene of crime and this being the position, for the alleged offences, convicting eight persons under Sections 148, 302 r/w.149 and 307 r/w.149 IPC should be held erroneous;

vii) the trial Court has committed legal error in accepting the test identification parade, when it is well demonstrated, eliciting answers from the witnesses that P.W.5 might have seen the accused before the Test Identification Parade in the jail, in the police station or in other words, the accused were shown to P.W.5 before the Test Identification Parade was conducted by the Judicial Magistrate and in this view, as ruled by the Apex Court, the evidentiary value of the Test Identification Parade is nil, which was not taken note of by the trial Court;

viii) all the cumulative effect of the above grounds, when lead to the only conclusion that the prosecution has miserably failed to prove the guilt of the accused, the conviction imposed is not only bad on facts but also in law and in this view, the appeal deserves to be accepted; and

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ix) when the materials would disclose as if along with P.W.5 there were two persons who might have seen the incident, for not examining those witnesses, an adverse inference ought to have been drawn.

Elaborating the above points, taking us through the records, as well as the evidence, a strenuous submission was made, pleading not guilty for the accused and praying for their acquittal.

9. We have heard the learned Additional Public Prosecutor on the above points.

10. According to the prosecution, the incident had taken place, due to previous enmity between A.1 and the deceased Sundar. P.W.1, though not connected the accused with the offences, would state that he knew A.1, as well as the deceased Sundar. He has not spoken about the alleged enmity between Sundar and A.1. Thiru Ramakrishnan, who has been examined as P.W.2, has also not spoken anything connecting the accused or assigning reasons for the murder, though he has not seen the actual incident.

11. P.W.6 Balakrishnan, has spoken about some dispute between the deceased and A.1, followed by the removal of A.1 from the job by Sundar. This also, in a way, supported by P.W.7, and the wife of the deceased P.W.8, indirectly. From the above evidence, it is clear - whether it proves the motive or not - that A.1 is not only known to P.W.5, but he was closely associated with the deceased, at least for some time. Therefore, ordinarily, when such a person who had the motive, attacked the deceased, witnessed by P.W.5, then when he preferred the complaint, certainly, the first thought should be, to mention the name of the known person viz. A.1, then further saying, along with him other unknown persons were also there, who could be identified later, giving the particulars of identification, to some extent, such as colour, figure, height, size of body etc. In Ex.P.7, which we will discuss infra also, P.W.5 has not mentioned the name of A.1, whereas though had an opportunity, he has stated contra that Sundar was attacked by 'unknown persons'. Even assuming, that there was some enmity, for A.1 against Sundar, that alone is not sufficient, unless it is shown, with certainty, that because of that motive, the incident had taken place.

12. Ex.P.7/complaint/first information, given by P.W.5, set the law into motion on 25.3.2001 on which basis, originally a case has been registered under Sections 147,148,341,324 IPC r/w. Section 147 of the Indian Railways Act. The incident had taken place on 24.3.2001 at about 11.15 p.m. at Nungambakkam Railway Station. This document would read that when Sundar, Swaminathan, P.W.5 and Mohan were waiting, for boarding a train, about 15 unknown persons or unidentifiable persons came there, armed with knives, iron rods, attacked Sundar. It further reads, the persons behind the attack must be Murugesan and Murugan, who is now arrayed as A.1. It is not the case of P.W.5, that Murugan or Murugesan

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were present at the time of the assault or A.1, being present, instructed the assailants, whether they are numbering 8 or 15, as the case may be, to attack Sundar or P.W.5, who attempted to prevent the incident.

13. This statement was recorded by P.W.15. P.W.15 also testified that P.W.5 has stated to him that he and Sundar were targeted, only by 'unknown persons'. When P.W.5 and deceased were admitted in the hospital, as inpatients, they were examined by P.W.11 Doctor, admittedly. Before the Doctor also, as seen from Exs.P.9 and P.10, both of them have stated that they were assaulted by 'unknown persons'. Nowhere, P.W.5 or the deceased, who was conscious, as per the evidence given by P.W.11 also, have murmured about the name of A.1, as if he was the assailant or at least he was present when the incident had taken place, giving instructions to the accused etc. Therefore, naturally, a doubt would arise, spontaneously also, whether P.W.5 would have seen A.1 and other accused, at the scene of occurrence, when Sundar was assaulted and the answer must be in the negative.

14. As stated above, it is the specific case of P.W.5 that he knew A.1 as well as Murugesan, who has not been arrayed as accused or cited as a witness. If really, now as spoken to by P.W.5 before the Court, A.1 was present at the scene of occurrence, naturally, certainly and undoubtedly, he should have disclosed or given the name of A.1, as the prime accused, who had assaulted Sundar, heading the team, giving instructions also. Unfortunately, we do not find any such averments in Ex.P.7, which is the earliest document, containing the genesis of the case, leading to the investigation. Therefore, the subsequent evidence given by P.W.5, as if A.1 was present at the scene of crime, directed the other accused to assault Sundar, must be, in our considered opinion, an unadulterated and blatant lie, not worthy of credence, which was believed, unfortunately, by the learned trial Judge, without assigning reasons, as if P.W.5 should be a dependable witness, when it is not so.

15. The submission made by the learned counsel for the appellants, to spread doubt over Ex.P.7, as if it should have come into existence after deliberation and the original FIR should have been suppressed, cannot be ignored, as if it has no substance, because of the indelible evidence available on the side of the prosecution itself. It is the specific case of P.W.5 that after the incident, boarding a train to Egmore, he reached the Egmore Railway Police Station, where he has given a complaint. It is further deposed by P.W.5, that after he has preferred the complaint, he was taken to Government Hospital and admitted in Ward No.1. It is his further case that on 25.3.2001, he was examined by railway police, recorded a statement. The evidence so given is not explained by re-examination, as if it is a mistake. From the above evidence, one thing is certain that P.W.5 should have given a complaint before the Egmore Railway Police and that is why, as noted by the Doctor in the Accident Register, P.W.5 was brought to the hospital, accompanied by the police. Law mandates, if a cognizable offence is reported, to a police officer,

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whether that station is having jurisdiction or not, the police officer has to record the statement, register a case, then if at all, transfer the same to the police station having jurisdiction. In this view, it is to be held, as spoken to by P.W.5 also, the Egmore Railway Police should have received a statement and that alone should be the first information regarding this incident and the subsequent statement, if any recorded, certainly, will not come within the meaning of 'FIR' in its real and true sense. No explanation is forth-coming, why the complaint given by P.W.5 to the Egmore Railway Police was not brought to the Court or under what circumstances, that was ignored and a second complaint was recorded from P.W.5-Ex.P.7, on which basis, a case has been registered. If it is explained at least, that no such complaint has been given by P.W.5, then there is a possibility of accepting Ex.P.7, to some extent, which chance was not given by the investigating agency to the Court. Therefore, for the suppression of the original FIR, given by P.W.5, a spontaneous doubt arises in our minds, which is not eradicated by any explanation.

16. It is spoken by P.W.5 that Sundar was admitted in the same hospital and it is also an admitted fact. In the chief examination itself, P.W.5 would state, on the next day, police have examined not only him, but also Sundar and when he gave the statement, Swaminathan and Sundar were also present. When Sundar was conscious, capable of preferring a complaint and when it is said, A.1 had enmity only against Sundar, it is not known why he has not preferred a complaint, detailing and cataloguing the incident, accounting the accused also for the injuries sustained by him. In the cross-examination also, P.W.5 admits that he has informed the police that they were attacked by 15 'unknown persons'. It is also further admitted by P.W.5 that in Ex.P.7, he has suspected Murugesan and Murugan, thereby showing neither Murugan nor Murugesan was present at the time of the incident. Thus viewing the case from positive as well as negative angle, even as per the evidence of P.W.5, as well as on the basis of Ex.P.7, the presence of A.1 at the time of the alleged incident is ruled out.

17. P.W.5 further states, that before preferring a complaint, he had conversion with Sundar, thereby showing, to some extent, there was deliberation, whether it was effective or not. Thus, it is once again made out, Ex.P.7 is not the first information emanated from P.W.5, whereas it must be a subsequent document, suppressing the original FIR and in this view, it should be concluded that the investigating agency has suppressed the genesis of the case, thereby shattering the very foundation of the case itself, which is further strengthened by P.W.15, who has recorded Ex.P.7.

18. In Ex.P.7, the endorsement made by P.W.15 is not to the effect that this statement was recorded in the Egmore Railway Police Station, whereas it would imply that on the basis of the statement received, a case came to be registered in Egmore Railway Police Station Crime No.242 of 2001, under Sections 147,148, 341, 324 IPC r/w.147 of the Indian Railways

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Act. It is also not the submission of the learned Additional Public Prosecutor, before us, that Ex.P.7 is the original FIR spoken to by P.W.5 and not the subsequent statement received from him at the hospital. P.W.15 has categorically deposed that on coming to know that two persons sustained injuries in the assault and were admitted in the hospital, he went to the hospital, received the statement, on which basis, a case came to be registered, as said above. Therefore, Ex.P.7 cannot be the substitute for the original FIR, which was admittedly given by P.W.5 in the hospital, as per his evidence, thereby once again, the non-explanation in not producing the original FIR strengthened the doubt, instead of weakening the same.

19. Many grounds were brought to our notice, including the unnaturality in the oral evidence of P.W.5, to disbelieve him, thereby in a way, convincing the Court, not to believe the oral evidence of P.W.5, in the absence of corroboration. We have already discussed in Para No.16 of our judgment about the information furnished by P.W.5 to P.W.15 regarding the persons attacked as 'unknown persons'. There is nothing wrong, if unknown persons have attacked, then, identifying them at later stage, as the assailants, for which there is procedure also. In Ex.P.7, P.W.5 has stated that if he happens to see the assailants, he could identify them. True, it is possible. For that, there must be some particulars regarding the person assaulted, such as their physical features, height, colour, size of the body etc., which could be noted by any person generally. If those particulars are given, then, the persons of the same physical features are arrested, they could be identified by the witness, which should have the credence.

20. Law is well settled, when an unknown person(s) commits the offence, if he is identified at the first instance in the Court, by the victim or witness, it has no substantial evidentiary value. In this view alone, Test Identification Parade is considered as the relevant piece of evidence under Section 9 of the Indian Evidence Act. If in the Test Identification Parade, the assailants are identified, not giving any room to doubt about its genuineness, then, accepting the same, acting upon it, is permissible under the hope or belief that the victim or the witness had identified the assailants or the culprits only because of the reason, they had seen them at the time of the commission of the offence.

21. In this case, there was an identification parade conducted by P.W.13-Judicial Magistrate. It seems, the Police have requested the authorities concerned, to make arrangements for conducting identification parade, informing that the witnesses Velappan (P.W.5) and Swaminathan would identify the suspected accused. It is the specific case of the prosecution that Swaminathan was also present at the time of the incident. But, unfortunately, the said Swaminathan was not summoned or if summoned, not identified the accused before P.W.13. Only P.W.5 had identified all the accused, as recorded by the Judicial Magistrate, in Ex.P.16. After the completion of the Test Identification Parade, P.W.13 questioned the

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suspected accused, as to whether they want to make any statement, for which, they have submitted, that they have been already shown to the witnesses in the police station. If this submission, made by the accused is corroborated or accepted as correct, then, the Test Identification Parade will lose its evidentiary value and in this regard, as pointed out by the learned counsel for the appellants, we have to see the oral evidence of P.Ws.5 and 16.

22. P.W.5 testified in the trial Court that he had identified all the accused, including the accused who assaulted him. He admits, during the cross-examination, that he had seen A.1 to A.4 at Choolaimedu Police Station, thereby clinchingly proving that before the Test Identification Parade, A.1 to A.4 were shown to P.W.5, so as to make him sure that he should identify the above accused, before the Judicial Magistrate also. Further, when it was suggested to him that accused No.4 to 8 were shown to him in the Police Station on 27.3.2001 on 18.4.2001, he denied and the denial appears to be against the admitted facts, which could be seen from the admission of P.W.16. P.W.16 admits that A.4 to A.8 were shown to P.W.5 on 18.4.2001 as per the endorsement made and available in the case diary. It is also further admitted by P.W.16, that P.W.5 has given a statement, when he was examined under Section 161 Cr.P.C., that he had seen accused No.1 to 3 also before the Test Identification Parade. He further admits:

"சாட்சியை எதிரிகளை அடையாளம் காட்டிய ஒரு வாரம் பிறகு அடையாள அணிவகுப்புக்கு அழைத்து வந்தேன் என்றால் சரி."

which proves clinchingly that P.W.5 identified all the accused before the Judicial Magistrate, after a weak from the date the accused were shown to him, which should lead to the only conclusion that P.W.5 would have identified all the accused, not because of the reason that he should have seen them at the time of the incident, but for the reason that he had seen them in the police station or shown to him. In this context, the non-mentioning of physical features of the accused and specific mention of assailants as 'unknown persons' take its magnitude. As adverted above, if all the accused, including A.1, are assailants, since A.1 was known to P.W.5, in the normal course, there would not have been any opportunity or chance for P.W.5 to say 'unknown persons' have attakced. If we read the evidence available on record, the irresistible conclusion should be, the identification parade is a farce, not conducted as required under law whereas the same was conducted after showing all the accused to P.W.5 and in this view, as ruled by the Apex Court in VIJAYAN vs. STATE OF KERALA [(1999) 3 SCC 54] and N.J.SURAJ vs. STATE, REPRESENTED BY INSPECTOR OF POLICE [(2004) 11 SCC 346], the evidentiary value of the same is nil. In this view, the oral evidence of P.W.5 vanishes by itself.

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23. Section 9 of the Indian Evidence Act envisages, under what circumstances identity of the accused is relevant and on this basis alone, generally, Test Identification Parade is conducted, to fix the accused, though it is not a substantial evidence, whereas to have corroboration, supported by other evidence. If the identity is to be taken as relevant piece of evidence, in fixing the accused, then, that identification should not be tainted with any irregularity or giving a chance to say the identification is the consequence of previously showing the accused to the witnesses, at the instance of the police, whereas it should be on the basis of original seeing of the accused, at the scene of occurrence. This fact was considered by the Apex Court in VIJAYAN vs. STATE OF KERALA [(1999) 3 SCC 54] wherein it is held:

> "if it is established that the accused was shown to the witnesses, either directly or by photographs, before the Test Identification Parade, the identification of the accused by the witnesses in the Test Identification Parade cannot be believed".

In the case involved in the above decision, as seen from paragraphs 7 and 8 of the judgment, not only photographs of the accused were shown to the witness, but also in all local newspapers his photographs were published. Under the facts and circumstances of the said case, it is held, the Test Identification Parade cannot be believed, which is the subsequent dictum of the Apex Court also, as seen from the decision in N.J.SURAJ vs. STATE, REPRESENTED BY INSPECTOR OF POLICE [(2004) 11 SCC 346].

24. In the case involved in the above decision, as seen from the facts, before Test Identification Parade, photographs of the accused were shown to the witnesses. On that basis, it is held, 'the identification parade, so conducted, becomes meaningless and no relevance can be placed thereon.' In the case on hand, as indicated above, the accused were shown to P.W.5, as admitted by P.W.16 and this being the position, on the basis of the identification, said to have been made by P.W.5 before P.W.13, it is impossible to say that the accused should have committed the alleged offence that too, considering the fact, P.W.5 has not given any identification marks of the accused, whereas he has specifically stated that all the accused are 'unknown'.

25. Even assuming that P.W.5 might have seen the incident, if we analyse his evidence legally, it proves unworthy of credence and it should be discarded which we will discuss, after recording a finding regarding the injuries sustained by the deceased as well as the cause of the death.

26. On the basis of the requisition given by the Investigating Officer under Ex.P.12, P.W.12 conducted autopsy over the body of the deceased Sundar. As indicated supra, when the post-mortem has been conducted, the Doctor has noticed seven injuries, including sutured wounds. All the major injuries appear to be stab injuries. The Doctor

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has opined that the deceased died of complication of stab injury, not pin-pointing, which is the fatal injury, leading to the death. From the nature of wounds, their dimension, depth etc., it is to be held that all the injuries might have been caused only by sharp edged weapon like knife, certainly, not by iron rod, which would generally cause, if used with force, contusion, laceration and certainly not stab injury. Thus, it could be safely concluded that the deceased was not attacked by any person by iron rod and if at all, all the injuries should have been inflicted upon his body only by using knives.

27. In this case, totally there are eight accused. It is also said, from all the accused weapons were seized or recovered. Except two knives-M.Os.1 and 2, other weapons recovered are iron rods, which are exhibited as M.Os.3 and 4. Having the above facts in mind, we have to see, the oral evidence of P.W.5, recapitulating the averments in Ex.P.7, whether it is the first information or it came into existence at a later point of time, as indicated by us.

28. In Ex.P.7, nowhere it is stated by P.W.5, that A.1 was present, instructed or directed the other accused to assault Sundar. A.1 being a known person to P.W.5, the absence of his name in the FIR, as well as the acts said to have been committed by him, in assaulting the deceased, would lead to the conclusion that the subsequent evidence given by him, while he was in the box, connecting the first accused with the other accused, must be, in our view, not only an unbelievable exaggeration, but also it must be an unadulterated and blatant lie.

29. P.W.5 has not implicated each accused, in the sense what are the weapons used by each and what are the injuries inflicted by each of the accused over the person of Sundar etc. In his evidence, only a general statement is available, which reads:

"முருகன் என்பவர் தலைமையில் முருகனை சேர்ந்து 8 போர் திரு சுந்தர் என்பவரை கத்தி கம்பி போன்ற ஆயுதஆக்களால் தாக்கி கொண்டு இருந்தார்கள்."

At later portion, he has stated, all the accused have assaulted Sundar, then, he was also assaulted by A.6. It is the further case of P.W.5, that when the incident had taken place, A.1 was physically present and he was instructing the other accused to beat and cut the deceased. The above evidence, given by P.W.5, in his attempt to implicate all the accused, does not find place in Ex.P.7, for which there is no explanation also. Even in respect of the injury sustained by this witness, we are unable to find a uniform evidence from his mouth, whereas the evidence given by him, how he sustained injuries, prompted us to disbelieve him.

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30. At the first instance, this witness would state, when he questioned the accused, why they are assaulting Sundar, he received a cut injury over the fore-head. A cut injury could be caused only by sharp edged weapon like knife and in this way, he identifies M.O.1 knife as the weapon used by A.6, to assault him. Nowhere it is stated, either by P.W.5 or revealed by the investigation, that A.6 was armed with knife. In fact, the weapon recovered on the basis of the confession, said to have been given by A.6, is only an iron rod. This being the position, the evidence, given by P.W.5, fails to instill confidence in our minds and therefore, it deserves only rejection as unbelievable, if to be believed, it may not be safe to convict the accused, considering the unnaturality and improbability of the prosecution case. For these reasons, we conclude, the oral evidence of P.W.5 should be eschewed, in which event, there is no other evidence, admittedly, to connect the accused with the crime.

31. When there are many accused facing the charges under Sections 148 and 149 IPC, there must be an independent charge against some of the accused, for the main offence, then only, the remaining accused could be dealt with and convicted under Section 302 r/w.149 IPC. Section 149 IPC reads:

> "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

Thus meaning and even making it mandatory, in our view, that an offence should have been committed by any member of an unlawful assembly in prosecution of the common object, then, taking the other members of the said assembly, to be dealt with under Section 149 IPC, for their mere presence, sharing the common object of the assembly, the common object being the murder or any other offence. In the case on hand, the trial Court has not framed any independent charge for the offence under Section 302 IPC. Though Section 149 IPC by itself does not contemplate any punishment, aid of this Section is to be sought for to punish an accused, if he has not independently committed the offence, whereas he was a member of the unlawful assembly, in prosecution of the common object. Therefore, in our opinion, for the charges framed under Sections 302 r/w.149 and 307 r/w.149 IPC, without any independent charge against any of the member of unlawful assembly, all the accused are not answerable, as such.

32. The materials, collected by the prosecution, also have not revealed, even as seen from the evidence of P.W.5, as to who is the prime cause for committing the murder of the deceased Sundar. The evidence of the Doctor is silent in this regard, informing the Court as to which injury was fatal. If there is medical evidence, pin-pointing the fatal

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injury, then we can go for ocular evidence, to find out, who had caused that fatal injury, thereby fixing him for the offence, whether it is under Section 302 or any other offence, affecting human body. In the absence of those materials alone, the trial Court, unable to fix any one of the accused under Section 302 IPC, attempted to rope in all the accused under Section 302 r/w.149 IPC, which appears to be basically incorrect.

33. We are conscious of the law that the effect of omission to frame or absence of or error in charge will not invalidate the sentence, slapped by a Court of competent jurisdiction, since this Court is also competent to modify the sentence, bringing the offence under some other provisions of law, if it will not cause prejudice to the accused. A charge framed under Section 302 r/w.149 IPC could be modified under Section 302 r/w.34 IPC, provided, it is shown a criminal act was done by several persons, in furtherance of the common intention of all, concluding each of such person is liable for that act in the same manner if it were done by him alone. If a person is to be roped in under Section 34 IPC, there must be some kind of overt-act, indicating, a criminal act was done by all, though it may not be necessary under Section 149 IPC. To convert the offence or to bring the accused under Section 302 r/w.34 IPC also, we do not find any materials, since P.W.5 himself has not spoken, implicating all the accused giving details, except the general statement, which is disbelieved by us, assigning unassailable reasons.

34. There is no case of conspiracy also, bringing the accused under Section 120-B IPC or 302 r/w.120-B IPC, if possible. The three Sections, which are available in IPC, to seek conviction, if the offence is committed by number of persons viz. Sections 34, 120-B and 149 IPC, cannot be applied to the facts of the case on hand, since there is no material, to prove either conspiracy or common intention or the presence of all the accused as unlawful assembly members, when one of them had committed the offence.

35. The submission of the learned counsel for the appellants, that there is no uniform or consistent evidence regarding the scene of crime, cannot be so easily brushed aside. The earliest documents, which came into light, after the incident are Exs.P.9, P.10, followed by Exs.P.7 and sketch-Ex.P.20. In Ex.P.9, the place of incident is described as "near Nungambakkam Railway Station on 24.3.2001 at 11.30 p.m., by unknown person". In Ex.P.10, the scene of occurrence described is "assault by unknown persons at 11.30 p.m. on 24.3.2001 at Nungambakkam Railway Station." The same Doctor recorded the above two statements, one at 12.15 a.m. on 25.3.2001 and another at 1.05 a.m. on the same day, in the hospital premises. It is not the case of P.W.5, that Doctor has not properly recorded the statement given by him. If P.W.5 and Sundar were attacked at Nungambakkam Railway Station, there is no reason to say in Ex.P.9 that assault was 'near' Nungambakkam Railway Station. There is lot of difference between 'near Nungambakkam Railway Station' and 'at Nungambakkam Railway Station', thus shifting the scene of crime.

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36. It is the usual practice of any investigating officer, first to fix the scene of occurrence, for which they used to inspect the place of incident forthwith, preserve the same, collect any materials available there, to fix the culpability of the assailants, examining them forensically. If the scene of occurrence was inspected, immediately, the Investigating Officer should have noticed the bloodstains, if any, if it is washed by somebody, traces, then examining the witnesses who did the same etc. If bloodstains were available, then it is the usual practice to take the earth, in order to ascertain whether those bloodstains are that of the deceased or the injured person, as the case may be. Strangely, in the case on hand, the Investigating Officer has not followed, even the usual procedure and in the absence of evidence, it is not known how in Ex.P.20, he has noted the scene of occurrence, as if it had taken place in the railway platform, which is not the case of the victim in Ex.P.9. Ex.P.7 is silent, where the deceased and P.W.5 were waiting to board the train. The oral evidence of P.Ws.1,6 and 7 also failed to enlighten the actual place of incident, though the above said witnesses would speak that on hearing, Sundar was attacked, they went to the Railway Station, took him and admitted him in the Hospital etc. The above evidence will demonstrate, that the prosecution has failed to fix the actual scene of crime and this is also one of the added grounds to doubt the genesis of the case, creating, spontaneous unavoidable doubt.

37. The Doctor, who examined Sundar was categorical in his evidence that the injured Sundar was conscious. He was admitted in the hospital on 24/25.3.2001 night. The deceased succumbed to the injury only on 29.3.2001 i.e. after four days. It is not known why no statement has been recorded from the injured Sundar, when he was alive and even conscious, as per the evidence of P.W.5, if investigation had taken place as claimed, pursuant to the FIR and registration of the case. If the deceased had been examined, certainly, he should have stated at whose hands, he received the multiple injuries, who are all the persons inimical towards him and what are the causes for attacking him etc. If the Investigating Officer had recorded the statement of the deceased, even that would come within the meaning of the Dying Declaration, in case connecting the accused also. This golden opportunity available to the prosecution was not utilised by the prosecution, for which, we think, there is nothing wrong in drawing an adverse inference, viz. that the investigating officer should have examined Sundar, even recorded a statement, but he might not have connected the accused and therefore, obtaining some statement from P.W.5, an attempt is made to connect all the accused, which cannot have the legal sanction.

38. P.W.2, in his examination, would state that when he enquired Sundar about the incident and as to why he was so careless, he informed him that Murugan, Saravanan, Sakthivel (A.1 to A.3) have committed this incident, informing that he did not remember others. In view of the fact, now Sundar is dead, a strange argument was advanced by the learned

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Additional Public Prosecutor, that this statement would come within the meaning of Section 32 of the Evidence Act, which we disagree.

39. P.W.1 also has spoken about the enquiry made by him with the deceased Sundar, while he was alive. If Sundar had exposed the names of three accused to P.W.2, the same should have been the case to P.W.1. But, P.W.1 would state that the deceased informed him that he was assaulted by 'unknown persons'. Therefore, the non-examination and non-recording of the statement from Sudnar, while he was alive, proved to be fatal to the prosecution case, creating more doubt.

40. Our sincere effort, by going through the judgment of the trail Court, to find, how conviction was recorded and sentences were slapped upon the accused for the offences under Sections 148, 302 r/w.149 IPC and 307 r/w.149 IPC, ended in vain, we should confess. The learned trial Judge, in her elaborate judgment, running to 37 typed pages, has not even attempted to give a finding, considering the rival contentions of the parties, as to why the contentions should be accepted or rejected and what are the reasons for the same. On the other hand, re-iterating the evidence already recorded and explaining the documents produced, as well as recording the rival submissions made by either counsel, but without appreciating the same from proper perspective, leading to a definite conclusion, whether it is correct or not, ultimately a presumptive finding alone has been given, as if all the accused are guilty of the offences under Sections 148, 302 r/w.149 IPC and 307 r/w.149 IPC, without assigning valid reasons based upon legal evidence, for which we cannot affix our seal of approval. In the light of the above discussion, where we have analysed the evidence threadbare, coupled with the attending circumstances and the unexplained doubts which came to surface spontaneously, the appeal deserves acceptance and therefore, the same is accepted.

In the result, the appeal is allowed, setting aside the conviction and sentence passed against all the appellants/accused by the learned Additional Sessions Judge (Fast Track Court No.V), Chennai, in Sessions Case No.115 of 2003, dated 6.1.2004. All the appellants/accused are found not guilty of all the charges framed against them and accordingly, acquitting them, ordered to be set at liberty, forthwith, if their detention is not required legally in any other case. The fine amount, if paid by the appellants/accused is ordered to be refunded to them. The bail bonds of the appellants/accused shall stand discharged.

Rao

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

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To

1.The Additional Sessions Judge,
(Fast Track Court No.V),
Chennai.

2.-do- through the Principal Sessions Judge,
Chennai.

3.The Director General of Police,
Chennai-4.

4.The Public Prosecutor,
High Court, Madras

5.The Superintendent,
Central Prison,
Vellore.

6.The Inspector of Police,
R-5, Choolaimedu Police Station,
Choolaimedu, Chennai.

+ 1 cc to Mr. C. M. Gunasekaran, Advocate SR No. 44368
+ 1 cc to Mr. V. Parthiban, Advocate SR No. 44236
+ 1 cc to Mr. N. Chandrasekaran, Advocate SR No. 44015

Judgment in Crl.A.325/2004

NG(CO)
SR/27.10.2006

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